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# In the Supreme Court of the United States

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., ET AL.,
PETITIONERS,

*v.*

GREG MANNING, ET AL.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE THIRD CIRCUIT*

## BRIEF FOR THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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## BRIEF FOR THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONERS

### INTEREST OF AMICUS CURIAE

SIFMA brings together the shared interests of more than 650 securities firms, banks, and asset managers. Its mission is to support a strong financial industry, investor opportunity, capital formation, job creation, and economic growth, while building trust and confidence in the financial markets. With offices in New York and Washington, D.C., SIFMA is the U.S. regional member of the Global Financial Markets Association.*

SIFMA has a unique perspective on this case. Many of its members are financial institutions subject to the Securities Exchange Act of 1934, 48 Stat. 881, 15 U.S.C. 78a *et seq.* This case concerns the interpretation of Section 27 of that Act, which grants exclusive jurisdiction to federal courts over Exchange Act violations. As both regulated entities and litigants in this area, SIFMA's members have a substantial interest in the meaning and scope of that provision. The decision below, if allowed to stand, would enable various state courts to establish competing interpretations of Exchange Act regulations under the guise of state law, in turn imposing different (and potentially conflicting)

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* Pursuant to Rule 37.6, SIFMA affirms that no counsel for a party authored this brief in whole or in part, and that no person other than amicus or its counsel contributed any money to fund its preparation or submission. All parties have filed letters with the Court granting blanket consent to the filing of amicus briefs.

obligations on SIFMA's members. Accordingly, SIFMA has a significant interest in the Court's resolution of this case.

## SUMMARY OF ARGUMENT

I. A. The decision below is inconsistent with Section 27's plain text, which provides that federal courts "shall have exclusive jurisdiction" over "violations" of the Act and over "all suits * * * brought to enforce any liability or duty created by [the Act] or the rules and regulations thereunder." 15 U.S.C. 78aa(a). Congress could hardly have been clearer or used broader language. Suits that assert the violation of a duty imposed by the Exchange Act or its accompanying regulations must be brought in federal court, even if plaintiffs nominally cloak their claims in state-law garb. Here, "[t]here is no question that [respondents] assert in their Amended Complaint, both expressly and by implication, that [petitioners] repeatedly violated federal law." Pet. App. 9a. Because plaintiffs have elected to premise their state-law claims on violations of the Exchange Act and its implementing regulations, there is exclusive federal jurisdiction over this case under Section 27.

B. The court of appeals based its contrary conclusion not on the text of Section 27, but on this Court's decision in *Pan American Petroleum Corp.* v. *Superior Court of Delaware*, 366 U.S. 656 (1961) (*Pan American*). See Pet. App. 19a-20a. In *Pan American*, this Court held that, when a plaintiff pleads purely state-law claims, a federal exclusive-jurisdiction provision does not bring the case into federal court based on federal defenses. Whether an exclusive-jurisdiction provision trumps a plaintiff's mastery of its own complaint and the well-pleaded complaint rule has no rel-

evance when, as here, a plaintiff pleads claims necessarily predicated on violations of federal law. The Court in *Pan American* correctly recognized that the term "exclusive" is not itself a generator of jurisdiction, but here what generates jurisdiction is the operative language of Section 27 that follows the term "exclusive": the language that confers jurisdiction over all violations of, and all suits brought to enforce, the Act and its implementing regulations.

II. A. The decision below defeats Section 27's intended purpose of achieving "greater uniformity of construction and more effective and expert application of" the Exchange Act. *Matsushita Elec. Indus. Co., Ltd.* v. *Epstein*, 516 U.S. 367, 383 (1996). Such uniformity is uniquely important to the Exchange Act. Unlike the Securities Act of 1933, which focuses on disclosures made as part of individual securities offerings (and permits state courts to exercise concurrent jurisdiction over certain non-class claims), the Exchange Act was intended to "remove impediments to and perfect the mechanisms of a *national market* system for securities." 15 U.S.C. 78b (emphasis added). As part of guaranteeing that participants in the financial markets are governed by national standards, Section 27's grant of exclusive federal jurisdiction ensures that "binding legal determinations of rights and liabilities under the Exchange Act are for federal courts only." *Matsushita*, 516 U.S. at 384.

B. Uniformity in the interpretation of the Exchange Act is critical to a number of important federal policies and interests, including the need for certainty and predictability in the financial markets. On respondents' approach, market participants would be forced to contend with interpretations of the Exchange Act and its regulations by numerous state

courts under a patchwork of many States' laws. That would undermine consistency in the rules governing trade settlement and clearing of securities transactions on the national exchanges, including here as to short selling, a common practice that facilitates both market liquidity and pricing efficiency. The resulting uncertainty would disrupt standard industry practices that allow millions of securities and commodities transactions to be processed quickly and cheaply every day. Securities clearing firms would either raise costs or reduce clearing operations, which would lessen market liquidity and impair short sale activity.

C. Finally, allowing state courts to implement varying interpretations of federal standards would encourage litigants to engage in forum shopping. Plaintiffs already have begun shifting their cases to state courts because of a lack of success on short selling claims brought in federal courts under the federal securities laws. And as this case shows, plaintiffs are further motivated to dress up Exchange Act claims in state law garb in an effort to avoid federal pleading standards and take advantage of state RICO statutes, which allow types of relief that are normally unavailable under the Exchange Act—namely, treble damages and attorney's fees. Those efforts will only multiply as the number of suits alleging Regulation SHO violations increases.

## ARGUMENT

The court of appeals held that Section 27 does not confer on federal courts any form of original jurisdiction over claims predicated on Exchange Act violations. See Pet. App. 22a (Section 27 "is coextensive" with Section 1331, "merely serves to divest state courts of jurisdiction," and "does not provide an independent basis to exercise jurisdiction."). The court of appeals' decision is inconsistent with the plain text and policies underlying Section 27, and this Court therefore should reverse the judgment below.

### I. THE DECISION BELOW IS INCONSISTENT WITH THE PLAIN TEXT OF SECTION 27.

#### A. Section 27 Grants Jurisdiction Over Suits Such As This One That Assert Violations Of, Or Are Brought To Enforce Duties Under, Regulation SHO.

1. In this case, respondents contend that petitioners engaged in "unlawful naked short selling" of stock. Pet. App. 44a, 55a, 61a. What makes that conduct unlawful in respondents' view is federal law. Their complaint repeatedly and expressly references federal law, in addition to incorporating standards of conduct located exclusively in federal regulations. See, *e.g.*, *id.* at 44a, 49a, 51a, 52a-54a, 55a, 59a. The reason for that is simple: the Securities and Exchange Commission has placed restrictions on broker-dealers that settle and clear short sales by promulgating Regulation SHO, 17 C.F.R. 242.200 *et seq.* There is no analogue to Regulation SHO in the State of New Jersey. See Pet. App. 9a.

Despite the fact that respondents base their claims on federal law—*i.e.*, Regulation SHO—they have as-

serted those claims under the guise of New Jersey statutory and common law, seemingly in an effort to avoid federal pleading standards and obtain treble damages under New Jersey's RICO statute. See Pet. App. 45a (explaining that respondents sought treble damages below). In other words, respondents seek to turn alleged violations of Regulation SHO into state-law claims by arguing that, because state law supposedly mirrors or incorporates federal law, petitioners violated state law when they engaged in conduct that violates federal law. As both courts below concluded, "[t]here is no question that [respondents] assert in their Amended Complaint, both expressly and by implication, that Defendants repeatedly violated federal law"—namely, Regulation SHO. Pet. App. 9a; see *id.* at 29a ("Notably, [respondents] do not dispute that the alleged unlawful conduct is predicated on a violation of Regulation SHO, 17 C.F.R. § 242.204.").

2. Respondents' own allegations should end the jurisdictional analysis. Section 27 of the Exchange Act vests federal courts with "exclusive jurisdiction of *violations of* [the Act] or the rules and *regulations* thereunder, and of *all suits* * * * *brought to enforce any liability or duty created by* [the Act] or the rules and *regulations* thereunder." 15 U.S.C. 78aa(a) (emphases added). Section 27 thus provides federal courts with exclusive jurisdiction over any action that asserts a violation of, or that is brought to enforce a liability or duty created by, the Exchange Act and its implementing regulations. The present case falls squarely within both categories.

a. On its face, respondents' complaint expressly alleges that petitioners "repeatedly violated federal law" in the form of Regulation SHO. Pet. App. 9a. In Section 27, Congress provided jurisdiction over all

"violations" of the Act and its implementing regulations. 15 U.S.C. 78aa(a). That language is not limited to criminal violations. Indeed, with respect to venue, Section 27 uses the term "violation" to refer not only to criminal proceedings, but also to civil actions for injunctive relief. See *id.* (providing for venue in "[a]ny suit or action * * * to enjoin any violation" of the Exchange Act or its implementing regulations). By its terms, the first clause of Section 27—the violations clause—extends to suits that, whether or not pleaded under the Exchange Act, are predicated on alleged violations of the Act. Respondents' suit plainly meets that test.

b. But even assuming this Court were inclined to read Section 27's first clause narrowly, that still would not justify the decision below. This action is brought to "enforce" a "duty" created by a regulation promulgated under the Exchange Act (Regulation SHO), even if the mechanism for enforcing that duty is a state-law cause of action that incorporates the federal standard. The court of appeals effectively read Section 27's second clause to apply only to suits that arise under the Exchange Act for purposes of federal-question jurisdiction under 28 U.S.C. 1331. But the language of Section 27 is much broader: it extends to "all suits" intended to enforce federal duties created by the Exchange Act or its implementing regulations, regardless of whether those suits are pleaded under federal or state law. The court of appeals' reasoning drains Section 27's second clause of any independent content.

Moreover, if Congress had intended Section 27 to apply only to suits arising under the Exchange Act for purposes of Section 1331, it would have said so. By 1934 when the Exchange Act was enacted, Congress

had frequently used the phrase "arising under" to confer jurisdiction on federal courts. Pet. Br. 37. Indeed, the same Congress that enacted the Exchange Act employed that term of art to confer jurisdiction in another statute. See Act of June 18, 1934, Ch. 568 Sec. 1, Pub. L. No. 73-375, 48 Stat. 979 ("That jurisdiction be, and is hereby, conferred upon the Court of Claims * * * to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims *arising under* or growing out of the Act of January 14, 1889.") (emphasis added). Respondents ignore Congress's decision instead to use broader language in Section 27.

### B. This Court's Decision in *Pan American* Does Not Compel A Different Result.

1. The court of appeals did not address the text of Section 27, holding instead that its ruling was controlled by this Court's decision in *Pan American Petroleum Corp.* v. *Superior Court of Delaware*, 366 U.S. 656 (1961) (*Pan American*). See Pet. App. 19a-20a. There is a reason respondents neither cited nor briefed *Pan American* below: it is fundamentally a contract case. The plaintiff in *Pan American* pleaded only state-law claims and made no attempt to invoke federal law. See 366 U.S. at 662-663 ("No right is asserted under the Natural Gas Act."). The Court held that, when a plaintiff pleads purely state-law claims, a similarly worded exclusive-jurisdiction provision in the Natural Gas Act (NGA), 15 U.S.C. 717(u), does not grant federal jurisdiction. But that holding has no bearing when, as here, a plaintiff pleads claims that expressly incorporate and rely on federal law.

In *Pan American*, a pipeline company paid more for natural gas than its contracts required because of

a pending state regulatory order. The company notified its suppliers that it had challenged the order and that it expected repayment in the event the order was lifted. See 366 U.S. at 658-659. The suppliers accepted payment subject to those conditions. See *ibid.* When this Court set aside the order, the pipeline company brought suit on its contracts in state court. The company pointed to the fact that its suppliers had agreed (or had not objected) to repayment in the event the state regulatory order was held invalid. See *id.* at 661. The suppliers, however, claimed that the case had to be heard in federal court in part because of the NGA's exclusive-jurisdiction provision. See *id.* at 661-662.

This Court disagreed for the obvious reason that although the plaintiff in *Pan American* could have pursued a federal filed-rate claim under the NGA, it had elected to pursue solely common-law claims. See 366 U.S. at 662 ("[T]he complaints in the Delaware Superior Court * * * demand recovery on alleged contracts to refund overpayments * * * or for restitution of the overpayments."); *id.* at 663 ("The rights as asserted by Cities Service are traditional common-law claims."). The Court recognized that federal issues could arise only by way of the suppliers' defenses, see *id.* at 662-663, and it therefore rejected federal jurisdiction under what is now commonly known as the well-pleaded complaint rule. See *id.* at 663 (citing, *e.g.*, *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 672 (1950)).

In *Pan American*, the plaintiff was not invoking federal law, either directly or indirectly. Here, by contrast, respondents have not asserted an independent, freestanding state-law claim. Only by invoking federal standards of conduct (namely, Regulation

SHO) do they manage to assert a claim at all. Indeed, their complaint repeatedly borrows the language of, and directly refers to, Regulation SHO. Respondents are the masters of their own complaint, see *The Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) ("[T]he party who brings a suit is master to decide what law he will rely upon."), and they elected to allege violations of the Exchange Act and Regulation SHO as the basis for their state-law claims. That conscious choice brings them squarely within the language of Section 27.

2. To be sure, the Court in *Pan American* recited the truism that exclusive jurisdiction is "'exclusive' only for suits that may be brought in the federal courts. Exclusiveness is a consequence of having jurisdiction, not the generator of jurisdiction." 366 U.S. at 664. In context, the *Pan American* Court was responding to the suppliers' argument that the NGA's exclusive-jurisdiction provision pulled the case into federal court based on their federal defenses. The Court rejected the notion that an exclusive-jurisdiction provision overrides the well-pleaded complaint rule. In determining whether a case falls within a jurisdictional provision—whether concurrent or exclusive—what matters is the well-pleaded complaint, not any defenses to that complaint. See *id.* at 663-665.

The *Pan American* Court did not mean that an exclusive-jurisdiction provision can never be a grant of jurisdiction—*i.e.*, that an exclusive-jurisdiction provision can only divest state courts of concurrent jurisdiction over cases that are already in federal court. Whether an exclusive-jurisdiction provision confers jurisdiction (in addition to divesting state courts of jurisdiction) depends on whether its operative lan-

guage is broader than other jurisdictional statutes. Here, the text of Section 27 is broader than this Court's interpretation of Section 1331: Section 27 creates federal jurisdiction whenever a plaintiff complains of a violation of, or brings suit to enforce, the Act and its implementing regulations—regardless of whether the suit is pleaded under federal or state law. See Pet. Br. 34-39. The term "exclusive" then ensures that not only *may* such suits be brought in the federal courts, but they *must* be brought there. The term "exclusive" does not generate jurisdiction, as the *Pan American* Court recognized. What generates federal jurisdiction is the expansive language of Section 27 that follows the term "exclusive."

3. Although *Pan American* states in passing in a footnote that the NGA's exclusive-jurisdiction provision is limited to cases "arising under" the NGA, 366 U.S. at 665 n.2, the Court based that dictum not on the provision's text, but on its legislative history. Specifically, the NGA's legislative history stated that the exclusive-jurisdiction provision there governs "cases arising under the act." S. Rep. No. 1162, 75th Cong., 1st Sess. 7 (1937); see H. Rep. No. 709, 75th Cong., 1st Sess. 9 (1937) (same).

The NGA's legislative history is not a basis to ignore the Exchange Act's plain text, but in any event the legislative history here is quite different. Congress debated whether Section 27 should give federal courts exclusive or concurrent jurisdiction, but Congress understood that Section 27 would "give to the Federal district courts * * * jurisdiction." Senate Consideration and Amendment of S. 3420—H.R. 9323 as Amended Passed in Lieu, 78 Cong. Rec. 8563-8604, 8571 (May 11, 1934) (debating whether "it was the intention of the committee to give to the Federal dis-

trict courts exclusive jurisdiction of violations under the act" or "to give jurisdiction either to the Federal court or to the State courts of general jurisdiction"). Congress thus knew that it was conferring jurisdiction, and there is no evidence in the legislative record that Congress intended its grant of jurisdiction to be coterminous with general federal-question jurisdiction under Section 1331. Section 27's grant of jurisdiction therefore should be taken on its own terms, which clearly cover this case.

## II. THE DECISION BELOW IS INCONSISTENT WITH THE PURPOSES OF SECTION 27.

### A. Section 27 Ensures Uniform Federal Interpretation Of Exchange Act Liabilities And Duties.

The purpose of Section 27 is "to achieve greater uniformity of construction and more effective and expert application of" the Exchange Act and its implementing regulations. *Matsushita Elec. Indus. Co., Ltd.* v. *Epstein*, 516 U.S. 367, 383 (1996). The decision below unquestionably undermines that purpose by allowing plaintiffs to plead around Section 27 in state court and thus posing the very real "danger that state court judges who are not fully expert in federal securities law will say definitively what the Exchange Act means and enforce legal liabilities and duties thereunder." *Ibid.*; see Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 Colum. L. Rev. 1211, 1241 (2004) (noting that state court adjudication of federal law tends to create disuniformity).

Indeed, the very point of Section 27's grant of exclusive federal jurisdiction is to ensure that "binding legal determinations of rights and liabilities under the

Exchange Act are for *federal courts only*." *Matsushita*, 516 U.S. at 384 (emphasis added). By creating exclusive federal jurisdiction, Congress furthered its interest in a "nationally uniform interpretation." *Reed* v. *Farley*, 512 U.S. 339, 348-349 (1994); see *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 483-484 (1981) (observing that "desirability of uniform interpretation" is an interest advanced by grant of exclusive federal jurisdiction); see also *Grable & Sons Metal Prods., Inc.* v. *Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005) (acknowledging "the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues").

Uniform interpretation and application of the Exchange Act are essential to effectuating Congress's intent to "perfect the mechanisms of a *national market system* for securities and a *national system* for the clearance and settlement of securities transactions." 15 U.S.C. 78b (emphasis added). Unlike the Securities Act of 1933, a narrower statute that focuses on disclosure and fraud in connection with offerings of securities and that permits state courts to exercise concurrent jurisdiction over certain individual (*i.e.*, non-class) claims, see 15 U.S.C. 77v; *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 752 (1975), the Exchange Act is concerned with the operation of the national market for securities. Allowing state courts to establish competing interpretations of the Exchange Act and its regulations, thus subjecting market participants to different (and potentially conflicting) rules in the various States, is squarely at odds with Congress's manifest desire to facilitate a truly national securities market.

### B. Uniform Federal Interpretation Of Exchange Act Liabilities And Duties Furthers Market Predictability And Efficiency.

1. Uniformity in the interpretation of the Exchange Act and its implementing regulations fosters a number of important federal policies and interests, including the need for predictability in the financial markets. See *Pinter* v. *Dahl*, 486 U.S. 622, 652 (1988) (noting that securities laws are "an area that demands certainty and predictability"). If the decision below were allowed to stand, market participants would face uncertainty not only with respect to *where* they may be compelled to defend against securities claims, but also with respect to *what* their duties and responsibilities will be under the federal securities laws. The practical reality is that market participants would be forced to comply with interpretations of the Exchange Act issued by numerous state courts under a patchwork of many States' laws—making it more difficult to ascertain what conduct does and does not run afoul of federal securities laws. That would defeat Section 27's purpose of achieving consistency in the rules governing trade settlement and clearing of securities transactions on national exchanges.

2. The uncertainty would be particularly pronounced with respect to short sales, which are very common transactions in which many market participants engage. Short selling involves "a sale of a security that the seller does not own or that is consummated by the delivery of a security borrowed by or on behalf of the seller." "Naked" Short Selling Antifraud Rule, SEC Release No. 34-58774, 73 Fed. Reg. 61,666, 61,667 (Oct. 17, 2008). So-called "naked" short selling occurs when "the seller does not borrow or arrange to borrow the securities in time to make delivery to the

buyer within the standard three-day settlement period." U.S. Securities and Exchange Commission, Office of Investor Education and Advocacy, *Key Points About Regulation SHO* (Apr. 8, 2015). To address concerns associated with abusive naked short selling, the Commission promulgated Regulation SHO, which places certain restrictions on short selling. See Christopher M. Salter & Christopher F. Chase, *Short Selling and Naked Shorts in the Regulation SHO Environment*, 40 Rev. Sec. & Commodities Reg. 232-33 (2007).

Those restrictions affect a wide variety of market participants, including those that engage in short selling as well as their brokers. See, *e.g.*, U.K. Financial Services Authority, *Discussion Paper no. 09/1—Short Selling* 7-9 (2009) (observing that short selling is a trading strategy frequently used by market makers and investment banks, as well as "traditional fund managers such as pension funds and insurance companies"). Indeed, for some market participants, short selling constitutes a significant portion or even the entirety of their trading strategy. See, *e.g.*, Ciara Connolly & Mark C. Hutchinson, *Dedicated Short Bias Hedge Funds: Diversification and Alpha during Financial Crises*, 3 (July 1, 2011), http://ssrn.com/abstract=1611627.

The SEC has observed that short selling provides "important benefits" to the market, including "market liquidity and pricing efficiency." Short Sales, SEC Release No. 34-48709, 68 Fed. Reg. 62,972, 62,974 (Nov. 6, 2003); see Amendments to Regulation SHO, SEC Release No. 34-59748, 74 Fed. Reg. 18,042, 18,044 (Apr. 20, 2009); International Organization of Securities Commissions, *Regulation of Short Selling—Consultation Report* 5 (2009). Short sellers "in-

crease liquidity, facilitate market making, and help markets to identify corporate fraud." Kevin A. Crisp, *Giving Investors Short Shrift: How Short Sale Constraints Decrease Market Efficiency and A Modest Proposal for Letting More Shorts Go Naked*, 8 J. Bus. & Sec. L. 135, 156 (2008).

According to the SEC, those benefits flow through to investors. By increasing liquidity, short selling enables "market professionals * * * [to] offset temporary imbalances in the buying and selling interest for securities." Amendments to Regulation SHO, 74 Fed. Reg. at 18,044. This "reduc[es] the risk that the price paid by investors is artificially high because of a temporary imbalance between buying and selling interest." *Ibid.* Short selling provides similar benefits to investors through increased pricing efficiency, which helps to ensure that investors relying on market pricing are not paying inflated prices for securities. See Ekkehart Boehmer & Julie Wu, *Short Selling and the Informational Efficiency of Prices*, 33-34 (Jan. 8, 2009) ("[P]rices appear to be closer to efficient or fundamental values when short sellers are more active."), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=972620.

3. Since 2006, short sellers, clearing brokers, and courts have seen an uptick in suits alleging violations of Regulation SHO. See Christopher L. Culp & J.B. Heaton, *The Economics of Naked Short Selling*, Regulation 47 (Spring 2008) ("Naked short selling has been the focus of an increasing number of lawsuits."). In light of the well-documented role that short selling plays in the market, the decision below stands to have a significant effect on financial markets. As claims concerning Regulation SHO increasingly are filed in state courts, there will be a corresponding increase in

"legal uncertainty for firms about whether activity that is lawful under the federal regulatory scheme may nevertheless be questioned in state court," which in turn "may cause firms to impose restrictions on customer short sale activity and limit proprietary short sale activity," thereby "reduc[ing] liquidity" and "harm[ing] the markets by making price discovery less efficient." Salter & Chase, *supra*, at 237.

That uncertainty would threaten the efficient settlement and clearing of securities transactions. Clearing firms—for mere fractions of a penny per share—perform the vital but ministerial "back office" functions necessary to clear and settle trades. Those firms settle millions of transactions every day. By subjecting them to litigation in myriad state courts applying varying interpretations of the Exchange Act and its accompanying regulations, the decision below threatens to disrupt their operations by raising costs or even driving firms to cease clearing operations. The negative consequences of disrupting the securities clearing system should not be underestimated: "The system routinely processes the multi-billion share trading volumes that characterize current securities markets. Without this highly efficient clearance and settlement system, modern securities markets simply could not function." Henry F. Minnerop, *Clearing Arrangements*, 58 Bus. Law. 917, 958 (2003).

### C. Uniform Federal Interpretation Of Exchange Act Liabilities And Duties Prevents Forum Shopping.

1. Allowing state courts to implement varying interpretations of federal standards also would encourage litigants to engage in forum shopping. Plaintiffs will bring their actions for enforcement of *federal*

rules and regulations in *state* court by dressing up federal violations in the language of state law. Plaintiffs thus would be able to invoke federal substantive standards while simultaneously staving off federal jurisdiction. That result is precisely what an *exclusive*-jurisdiction provision like Section 27 is meant to avoid. See, *e.g.*, *Heller, Ehrman, White & MacAuliffe* v. *Babbitt*, 992 F.2d 360, 363 (D.C. Cir. 1993) (Plaintiffs "may not, by creatively framing their complaint, circumvent a congressional grant of exclusive jurisdiction.").

2. Litigants already have begun shifting their cases to state courts in search of greener pastures. Because of a lack of success on short selling claims brought in federal courts under the securities laws, "the plaintiffs' bar has turned its attention to state court claims" for naked short selling. Alexis Brown Stokes, *In Pursuit of the Naked Short*, 5 N.Y.U. J. L. & Bus. 1, 39 (2009); see, *e.g.*, *Overstock.Com, Inc.* v. *Goldman Sachs & Co.*, 231 Cal. App. 4th 513 (2014) (addressing, *inter alia*, whether trades were "designed to evade Regulation SHO"); *Life Partners Holdings Inc. et al.* v. *optionsXpress Inc. et al.*, No. 14CH6428 (Cir. Ct., Cook County, Ill. Apr. 14, 2014) (complaint repeatedly refers to Regulation SHO and alleges that defendants violated rules and regulations "designed to detect, monitor, and prevent the creation and sale of counterfeit-phantom stock").

Those attempts to plead state-law claims in state courts are undoubtedly driven by a desire not only to find a more hospitable forum for bringing short selling claims and to avoid more demanding federal pleading standards, but also to obtain remedies—like treble damages and attorney's fees—that are not generally available under the Exchange Act. See *Sedima*

*S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 504-505 (1985) (Marshall, J., dissenting) ("[T]he federal securities laws contemplate only compensatory damages and ordinarily do not authorize recovery of attorney's fees. By invoking RICO, in contrast, a successful plaintiff will recover both treble damages and attorney's fees."); see also, *e.g.*, N.J. Stat. Ann. 2C:41-4(a)(8) (RICO statute authorizing treble damages); Ariz. Rev. Stat. 13-2314.04(A) (same).

Those efforts will only multiply as the number of suits alleging Regulation SHO violations increases. As state courts develop varying interpretations of the duties imposed by Regulation SHO, litigants will seek out the most favorable forum. In light of the "need for uniform enforcement" of the Exchange Act, *California* v. *Am. Stores Co.*, 492 U.S. 1301, 1306 (1989), this Court should put an end to forum shopping over short selling claims, provide clarity and predictability to a substantial segment of the securities markets, and hold that Section 27 confers original federal jurisdiction over claims predicated on violations of the Exchange Act or regulations promulgated thereunder (such as Regulation SHO).

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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